

Federal Communications Commission

DA 95-1145

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

DISPATCHED BY
MM Docket No. 95-74

In the Matter of

Amendment of Section 73.202(b), RM-8579
Table of Allotments,
FM Broadcast Stations.
(Benavides and Bruni, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 23, 1995;

Released: June 1, 1995

Comment Date: July 24, 1995

Reply Comment Date: August 8, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Benavides Communications ("petitioner"), permittee of Station KXTM(FM), Channel 299C2, Benavides, Texas, requesting the reallocation of Channel 299C2 from Benavides to Bruni, Texas, as the community's first local transmission service, and the modification of Station KXTM(FM)'s construction permit to specify Bruni as its community of license. In addition, petitioner proposes the allotment of Channel 254A to Benavides, Texas. Petitioner states that it will apply for Channel 299C2 at Bruni and Channel 254A at Benavides, Texas.

2. Petitioner seeks modification of Station KXTM(FM) permit pursuant to the provisions of Section 1.420(i) of the Commission's Rules, which permits the licensees and permittees of an existing station to specify a higher class channel and/or a new community of license without affording other interested parties an opportunity to file competing expressions of interest.¹ Petitioner advises that the requested reallocation to Bruni is mutually exclusive with the existing allotment of Channel 299C2 at Benavides. Petitioner asserts that the adoption of its proposal will result in a preferential arrangement of allotments by bringing a first local aural transmission service to Bruni and would not deprive Benavides of its sole "existing" local service. Petitioner states that the Commission has noted that, for the

purpose of change of community rule makings, unconstructed permits are not considered to be an "existing service", citing *Change of Community MO&O*, 5 FCC Rcd at 7097; and see also *Farmington and Gallup, New Mexico*, 7 FCC Rcd 2382, 2383 (1992). It argues that since Station KXTM(FM) has never been on the air, there can be no existing service lost.² In addition, petitioner states that the reallocation of Channel 299C2 to Bruni would allow the allotment of Channel 254A to Benavides, thereby permitting Benavides to maintain a local FM service.

3. Based on the information before us, we are unable to determine whether petitioner's proposal would result in a preferential arrangement of allotments. Our initial analysis of petitioner's proposal indicates that while it would provide a first local aural transmission service to Bruni and a new allotment at Benavides, petitioner has failed to advance any evidence indicating that Bruni is a community for allotment purposes. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission fairly, equitably, and efficiently distribute frequencies "... among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status.³ Bruni is not incorporated nor is it listed in the U.S. Census. In light of Bruni's lack of inclusion in the U.S. Census, we are not convinced that adoption of petitioner's proposal would further the policy goals of Section 307(b) and the allotment priorities and policies.⁴ Therefore, petitioner should present the Commission with sufficient information to demonstrate that Bruni is incorporated, or that it has social, economic, cultural, or governmental indicia to qualify it as a "community" for allotment purposes.⁵

4. As a justification for its proposed change of community, petitioner states that the public interest would be served by the reallocation of Channel 299C2 from Benavides to Bruni, since it would provide Bruni with its first local aural transmission service. However, we are concerned that a loss of potential service to segment of Benavides could occur, as petitioner seeks to replace a Class C2 station at Benavides with a Class A facility. Therefore, we request petitioner to submit information regarding any loss of potential service that would result from this proposal to those persons located within the proposed service area of Station KXTM(FM), Channel 299C2, Benavides, Texas. We also request information as to the extent that this potential loss area could eventually be compensated by the allotment of Channel 254A to Benavides. Since petitioner seeks to relocate its transmitter, we request that it provide information showing the areas and populations which will receive new service and the areas and populations which will lose potential service if

¹ See *Modification of FM and TV Authorizations to Specify a New Community of License ("Change of Community R&O")*, 4 FCC Rcd 4870 (1989), *recon. granted in part ("Change of Community MO&O")*, 5 FCC Rcd 7094 (1990).

² Petitioner notes that KXTM(FM)'s construction permit was not granted as a result of a comparative hearing, thus there is no requirement that the station must operate at Benavides for at least one year before seeking a change in community.

³ We note that Bruni is listed in the 1994 Rand McNally Commercial Atlas and attributed with a population of 375 persons. However, mere geographical location is not sufficient to establish "community" status. See, *Vimville, Mississippi*, 48 FR

5974 (1983), *Hannibal, Ohio*, 6 FCC Rcd 2144 (1991), and *Columbia, California*, 56 FR 26357 (1991), 6 FCC Rcd 3292 (1991).

⁴ The FM priorities are (1) first aural service, (2) second aural service, (3) first local, and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982).

⁵ See, e.g., *Beaver Springs, Pennsylvania*, 4 FCC Rcd 5373 (1989), *Sargent, Nebraska*, 4 FCC Rcd 3933 (1989), *Bartow, Georgia, et al.*, 4 FCC Rcd 6876 (1989), *East Hemet, California, et al.*, 4 FCC Rcd 7895 (1989), and *Ellwood, California*, 50 Fed. Ref. 13031, published, April 2, 1985.

Channel 299C2 is reallocated to Bruni. The study should also indicate the number of reception services which are now available within the gain and loss areas. Assuming that Bruni is found to be a community for allotment purposes, petitioner needs to provide information as to the overall public interest benefits that would be advanced from the grant of this proposal.

5. Channel 299C2 can be reallocated from Benavides, Texas, to Bruni, Texas, in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.⁶ Channel 254A can be allotted to Benavides with a site restriction of 11.8 kilometers (7.3 miles) south to accommodate petitioner's desired transmitter site.⁷ As requested, we also propose to modify petitioner's construction permit for Station KXTM(FM) to specify Bruni as the station's community of license. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept expressions of interest in the use of Channel 299C2 at Bruni or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties. Since Bruni and Benavides are located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence by the Mexican government has been requested.

6. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No.	
	Present	Proposed
Benavides, Texas	299C2	254A
Bruni, Texas	--	299C2

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **July 24, 1995**, and reply comments on or before **August 8, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

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2000 L Street
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(Counsel for petitioner)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table

of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202)418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

⁶ The coordinates for Channel 299C2 at Bruni are North Latitude 27-25-31 and West Longitude 98-50-21.

⁷ The coordinates for Channel 254A at Benavides are North Latitude 27-29-48 and West Longitude 98-26-59.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.